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# United States

# Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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Sam Yick and Jung Kim, alias Jung Chung,
*Plaintiffs in Error,*
*vs.*
United States of America,
*Defendant in Error.*

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## BRIEF OF PLAINTIFFS IN ERROR.

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### THE FACTS.

Plaintiffs in error were convicted under an indictment which charged them with conspiring to bring from Mexico into the United States certain Chinese persons who were not entitled to enter or remain therein.

The actors in the alleged conspiracy were:

*Sam Yick*, for thirty-one years a peaceful, reputable merchant and citizen of Bakersfield, California [Tr. pp. 192-206].

*Jung Kim,* who helped in Sam Yick's store.

*Edward T. Morse,* United States government inspector of immigration at Bakersfield.

*A. G. Bernard,* United States government inspector of immigration at San Diego, California.

*Charles T. Connell,* head of the United States immigration office at Los Angeles, California, and the immediate official superior of Morse and Bernard.

Morse was sent to Bakersfield in January, 1911. He there met Sam Wick, frequented his store, consulted him on matters affecting local Chinese [Tr. pp. 43, 44], and used him occasionally as an interpreter [Tr. p. 75]. Morse says that on May 8, 1911, in a conversation with Sam Yick, Sam told him how easy it would be to make some money smuggling Chinese in from Mexico. Morse at once fell in with the plan and agreed to help Sam [Tr. p. 78]. So anxious was he that Sam Yick should carry this idea into execution, that he went at once to Los Angeles to see Mr. Connell, his superior officer, and there a plan was initiated to trap Sam Yick [Tr. pp. 86-87-88-89]. Two government officials were now actively engaged in the plot, but to insure success it was necessary to have still another, so *A. G. Bernard* was summoned to Los Angeles by Connell [Tr. p. 117] and the plan unfolded to him. This was on May 22, 1911. So zealous a conspirator does Bernard appear to have become almost at once, that, not having heard anything since his interview with his superior, and fearing that after all Sam Yick might not be enticed into crime, he wrote a letter on June 23, 1911, calling attention to the Sam

Yick plot, in which he had become an arch conspirator, and saying that the time was now very favorable to put the scheme into operation [Tr. p. 118]. Connell and Morse between them [Tr. pp. 89, 91] suggested that Bernard should go to Bakersfield and make the acquaintance of his intended victims. Accordingly a meeting was held in Sam Yick's store on August 24, 1911, at which were present Sam Yick, Morse and Bernard. Jung Kim was brought in later and introduced as "the guide" who would lead the Chinese over from Tia Juana. It was the express intention of both Morse and Bernard, as they walked to this meeting together, to entrap Sam Yick and Jung Kim and to get them so far in the toils that their conviction of a crime would be easy [Tr. p. 113]. With this end in view ways and means of effecting the object of the conspiracy were suggested to the Chinaman by both of these government officials. Morse suggested the marked card system whereby the Chinese brought over were to be identified [Tr. pp. 91-2]. It was arranged that Jung Kim should go to San Diego and on his arrival telephone Bernard [Tr. p. 80]. To make sure that Jung Kim really went to San Diego, Morse was at the station to see him off and examine his ticket [Tr. p. 81]. Bernard suggested the route by which the Chinese should be brought over [Tr. p. 104]. Bernard met Jung Kim on his arrival in San Diego, accompanied him to Tia Juana on a tour of inspection [Tr. pp. 106, 107], in fact was with him wherever he went [Tr. p. 116], accompanied him, with another government inspector, on the night when the Chinese

were to be brought over [Tr. p. 108], but, unfortunately for the success of his scheme, Jung Kim was left to his own devices a mile or so on the American side of the line, with the result that he came back without any Chinese [Tr. pp. 108, 109], the brains of the conspiracy were absent for a brief period, and the scheme collapsed.

No Chinamen were brought over. Jung Kim appeared at the place on the American side of the line where Bernard and another inspector were waiting for him, but no Chinese came with him. The government officers were there waiting to apprehend any Chinese who might come over, hold them as witnesses against these defendants, and then deport them. Thus the commission of the crime would have been prevented. Three Chinese did, however, find their own way over by another route and were arrested on the streets of San Diego a day or two later.

## SPECIFICATIONS OF ERRORS.

### I.

**The Giving of the Instruction Set Out Below is Prejudicial Error for Which the Judgment Will be Reversed Under the Authority of Woo Wai vs. United States.**

Under this state of the evidence the court gave to the jury the following instruction:

"The court further instructs you that the fact, if it be a fact, that government officers incited or aided defendants to commit the crime charged against them, if they did commit it, is no bar to a prosecution by

the government. The court further instructs you that persons engaged in a criminal conspiracy such as here charged may be held guilty of the crime even though they were incited to it by government officers or were acting in the belief that government officers or agents were co-operating with them, and notwithstanding the parties so engaged were depending upon such officers to protect them from arrest and to aid in carrying out the objects of a conspiracy.

"If, therefore, you find from the evidence beyond a reasonable doubt that there was a conspiracy between the defendants as alleged in the indictment, and that the defendant Jung Kim committed either of the overt acts therein charged it will be your duty to find the defendants guilty, and notwithstanding officers of the government participated, if they did participate in any of the acts committed by the defendants or either of them."

The defendants excepted to the giving of this instruction and assigned the same as error. [Tr. p. 241.]

The giving of this instruction is error for which the judgment will be reversed.

Woo Wai v. United States, 223 Fed. 412.

The Woo Wai case is the most recent expression of the views of this court on the subject of incitement and entrapment, and the views therein expressed must, we submit, control in the decision of the case at bar.

The Woo Wai case holds:

*First:* That it is against public policy to sustain a conviction obtained by incitement and entrapment. In

support of this view numerous cases are cited and discussed in the opinion, amongst others,

O'Brien v. State, 6 Tex. App. 665;
Commonwealth v. Bickings, 12 Pa. Dist. R. 206;
Love v. People, 160 Ill. 501, 43 N. E. 710;
Commonwealth v. Wasson, 42 Pa. Super. Ct. 38;
Saunders v. People, 38 Mich. 218;
People v. McCord, 76 Mich. 200, 42 N. W. 1106.

To these we may add:

State v. Dudoussat, 47 La. Ann. 977, 17 A. and E. Ann. 296;
People v. Draisted, 13 Colo. App 532, 58 Pac. 796;
U. S. v. Healy, 202 Fed. 350;
U. S. v. Whittier, 28 Fed. Cas. p. 594, Case No. 16,688;
Connor v. People, 18 Colo. 373, 25 L. R. A. 348;
U. S. v. Adams, 59 Fed. 677;
U. S. v. Jones, 80 Fed. 513

"It must be conceded that contrivances to induce crime (the contriver confederating for the purpose with the criminal) are most rigidly scrutinized by the courts, even when the contrivances are lawful in themselves. But when the contrivances are of an unlawful character, should courts not be even more strict?

"No court should, even to aid in detecting a supposed offender, lend its countenance to a vio-

lation of positive law, or to contrivances for inducing a person to commit a crime."

U. S. v. Whittier, 28 Fed. Cases, p. 594, Cas. #16688.

"The government agent was therefore not engaged in detecting crime, but in procuring its commission.

"These facts tend to show that the accused was reluctant to act in the particular transaction, and the fact adds to the reprehensible character of the conduct of the prosecuting witness. There is no case which goes so far as to allow a conviction upon such a state of facts."

U. S. v. Adams, 59 Fed. at p. 677.

"There is something repugnant in the idea of the government, by art and contrivance, entrapping one of its citizens into the commission of crime in order to subject him to criminal prosecution; and such prosecutions have been felt by the courts to be more or less objectionable in morals and in policy. * * * But to go further, and after the citizen has been seduced by the government into robbing the mail, to prosecute him criminally for the act is more or less offensive to public sentiment."

U. S. v. Jones, 80 Fed. 513-514.

The case at bar is not analogous to the case of the employment of detectives to secure evidence or of sending decoy letters to ascertain whether a crime has or was about to be committed. It is a case of the officials of the government displaying a morally un-

wholesome zeal and anxiety to make criminals of two upright, reputable and honorable citizens.

SECOND: The decision in the Woo Wai case, in addition to the ground of sound public policy just noted, was also based on the fact that the evidence fell short of showing that there was in fact a conspiracy to commit a criminal act within the meaning of section 5440. "It was the intention of the officers who induced Woo Wai and his associates to attempt to bring Chinese across the Mexican border *that the law should not be violated*. They intended to prevent the consummation of the offense which they lured the defendants to undertake."

An exactly similar situation exists in the case at bar. The government officers Bernard and Neilsen who were operating with Jung Kim around San Diego and Tia Juana, intended to prevent any violation of the law. So also did Morse. As said in the Woo Wai case, "their purpose was to intercept the Chinese so brought across the border and return them to the country from whence they came." The acts of the defendants were not to result in an accomplished offense against the laws of the United States. For this reason also the judgment should be reversed.

Woo Wai v. United States, *supra*.

As to sufficiency of Exception to instruction See waiver of Counsel for respective parties and court order in minutes of court page 32 of Transcript of Record.

II.

**The Demand for the Return to the Defendants of the Letters Taken by the United States Attorney and the Immigration Officials From the Trustee in Bankruptcy Should Have Been Granted.**

There were introduced in evidence by the government certain letters, nine in number, and which appear in the Transcript at pages 174 to 191, which papers were taken from the store of the defendant in Bakersfield by the sheriff by virtue of a writ of attachment and were subsequently taken from the sheriff by the trustee in bankruptcy of the Sam Yick Company, and were, by said trustee, turned over to the government immigration officials in Los Angeles. Immediately upon the production of the letters in court counsel for the defendants made a demand on the government for the immediate and absolute surrender of all of the documents to the defendants. [Tr. p. 150.] This demand was refused [Tr. p. 168] and the refusal was assigned as error [Tr. p. 239].

The refusal of this demand is a violation of the constitutional rights of the defendants secured them by the fourth and fifth amendments to the Constitution of the United States, which provide:

(a) That a person shall be secure against unreasonable seizure and searches.

(b) That a person shall not be compelled to be a witness against himself in a criminal case.

The constitutional privileges include protection from the necessity of producing documents or chattels in re-

sponse to a subpoena *duces tecum* or *other and equivalent form of process,* treating him as a witness, or the articles or chattels as subjects of evidence because at any time he might be called upon to establish the identity, authenticity, or origin of the article produced.

State v. Fuller (Mont.), 85 Pac. 369, 8 L. N. S. 762, 9 Ann. Cas. 648;

Thornton v. State (Wis.), 93 N. W. 1107, 98 Am. St. 924.

In order to bring the evidence within the constitutional restriction it must be produced under *compulsion.*

State v. Newcomb (Mo.), 119 S. W. 405;

Blum v. State (Md.), 51 Atl. 26, 56 L. R. A. 322;

McKnight v. U. S., 115 Fed. 972.

Such wrongful compulsion is exercised in violation of the 5th amendment, and the 4th amendment, forbidding unreasonable searches and seizures, is also violated by a statute compelling a defendant or claimant in a proceeding for the forfeiture of goods alleged to have been fraudulently imported to produce in court his private books, papers and invoices on penalty of having the allegations of the bill against him taken *pro confesso.*

Boyd v. U. S., 116 U. S. 616, 29 L. Ed. 746.

An order for the production of private books of account is such a compulsion.

Blum v. State (Md.), 51 Atl. 26, 56 L. R. A. 322.

In this latter case (Blum v. State) the Maryland Court of Appeals held that the *account books* of one charged with having obtained money under false pretenses were not admissible against defendant under the rule protecting him from giving evidence against himself, although such books were voluntarily turned over to receivers appointed by the court in a proceeding to which the accused consented.

The facts in this case are almost identical with those in the case at bar. The receiver in the Blum case, after qualifying, went to defendant's store and took over the keys from the constable who was in charge under an attachment and took possession of everything in the store, including the books. In the case at bar the letters in question were taken by the trustee in bankruptcy from the sheriff, who had taken them under a writ of attachment [Tr. p. 153], and subsequently turned them over to the United States immigration inspector in Los Angeles.

The case of Weeks v. United States, 232 U. S. 383, 58 L. Ed. 652, is, we respectfully submit, absolutely determinative of the right of the defendants here to have their demand for the return of these letters granted. In the Weeks case, *supra,* the defendant was arrested by a police officer without warrant; other police officers went to his house, were told where the key was by a neighbor, found it, and entered the house. They searched the defendant's rooms and took various papers, etc., which were afterwards turned over to the marshal. Later in the day the same police officers

returned with the U. S. marshal and, being admitted by someone in the house, searched the defendant's room and carried away letters and envelopes found in a drawer. Neither the police nor the marshal had a search warrant. Before the trial and at the trial the defendant demanded the return of these papers, which was refused, and they were introduced in evidence against him. The Supreme Court held this to be prejudicial error and reversed the conviction. We quote from the opinion:

> "The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are,

are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused. In Adams v. New York, 192 U. S. 585, 48 L. Ed. 575, 24 Sup. Ct. Rep. 372, this court said that the 4th amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. Boyd case, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action. * * *

"We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed."

lso:
S.,v. Abrams, 230 Fed. 313,
S.,v. Wong Quong Wong, 94 Fed.832.

stion were, as we have seen, first taken by the sheriff under a writ of attachment, were by him turned over to the trustee in bankruptcy, who in turn, on the order of the United States district attorney, delivered them to the immigration inspector at Los Angeles. [Tr. pp. 150-159 and 160-165.]

Now, while under the decision in the Weeks case we contend that it makes no difference whether the possession was or was not unlawful, yet it is apparent to us that in this case it was unlawful. Assuming that the sheriff's seizure was lawful, though the property was not subject to attachment under C. C. P. 690, and assuming that the trustee in bankruptcy rightfully took possession of the papers, yet his action in turning them over to the immigration officials was absolutely unjustified. As remarked in the Weeks case, 'not even an order of court would have justified such procedure,'

much less an order of the district attorney. [Tr. pp. 162-164.] The papers were merely in the temporary custody of the trustee in bankruptcy. If they were assets of the estate he held title to them for the benefit of the creditors, and he violated his trust in turning them over to any other person; if they were not assets —and they very evidently were not—the most that can be said is that by virtue of his office he obtained temporary access to and control over them, but having determined that they were in no sense assets of the estate he should at once have returned them to the bankrupt, and his possession of them thereafter was unlawful. We say, then, that the taking of these documents was unlawful because:

(a) The trustee in bankruptcy never acquired any title to them. He could obtain title only to such property as is set out in section 70 of the Bankrupt Act (Fed. Stats. Ann., pp. 697-8). Subdivision *one* of this section is the only portion applicable to property of this kind, and it gives the trustee title to *"documents relating to his* (the bankrupt's) *property."* An inspection of the letters in question, which appear in the Transcript at pp. 174-191 as United States Exhibits 12 A to 12 M, inclusive, shows that they are private letters, in no way relating to the bankrupt's property.

(b) The trustee was divested of any title he may have had by his discharge and the termination of the bankruptcy proceedings, which occurred in November, 1912.

(c) And lastly, the letters were not produced by the trustee in bankruptcy but by the United States attor-

ney [Tr. p. 149], who presumably secured them from the government immigration officials, to whom they were delivered by the trustee [Tr. p. 163]. Neither the government attorneys nor the immigration officials procured these papers lawfully, the trustee had no authority to turn them over. There was not even an order of court directing him to do so, though even that would not have sufficed under the authority of the Weeks case. The papers were brought from Bakersfield to Los Angeles by the trustee on the order of the United States attorney's office [Tr. p. 162], and were apparently, without any other formality, left with immigration officials. [Tr. p. 163.] The trustee himself was not in lawful possession of the papers.

III.

**The Letters Marked United States Exhibits 12A, 12B, 12C, 12D, 12E, 12F, 12G, 12H, 12I, 12J, 12K, 12L, 12M, Introduced by the Plaintiff, were, and Each and Every One of Them was, Improperly Admitted in Evidence Against the Objections of Each of the Defendants.**

These letters were found in a tin box taken by virtue of a writ of attachment by the sheriff of Kern county from the store of the Sam Yick Company at Bakersfield, were subsequently turned over by the sheriff to Charles E. Kruse, trustee in bankruptcy of the Sam Yick Company, and by said trustee delivered to the government immigration officials in Los Angeles. The introduction in evidence of each and every one of these letters was objected to by each of the defendants. We

will briefly consider each letter in the order in which they appear in the transcript.

1. On Tr. p. 174 appears United States Exhibit 12J. This is a letter addressed to *Mr. Deang Coy* and signed by *Quan Ching Lim,* and there appears underneath this signature the words "To Sam Yick Company, Riverside." The letter is dated April 13, 1911. There is nothing to show where or when the letter was mailed. The letter refers to "a *countryman at your place* who desires to come to the United States," and mentions ways and means of getting him into the United States without being caught by the immigration officials. That the contents of the letter were injurious to the defendants is apparent. It will be noted that the letter

(a) Is not addressed to the defendants or either of them.

(b) It is not signed by the defendants or either of them.

(c) It is not shown to have been in the possession of the defendant Sam Yick or the defendant Jung Kim. It in no way refers to *either* of the defendants.

(d) No connection whatever is shown between either of the defendants and the addressee or signer.

(e) The letter is dated April 13, 1911, but it does not appear when or where it was mailed. The government contends that it corroborates Sam Yick's statement to Morse on May 8, 1911 [Tr. p. 46], that he had certain letters from friends who wanted to come over. But this statement was confined to friends in *Juarez,* Mexico [Tr. p. 46], and there is no mention of Juarez in the letter and no proof that it came from

there. The fact that the letter was dated April 13, 1911, is no proof that it was in Sam Yick's possession on May 8, 1911, or that he had received it at that time. The letters were not found in the Sam Yick Company store until October, 1911. [Tr. p. 158.] Nothing was done in furtherance of any of the matters charged in the indictment after the end of September, 1911.

(f) If it is contended that the letter was in reality intended for Sam Yick or Jung Kim, though addressed to another, this is refuted by the contents, because the letter speaks of "a countryman *at your place.*" Now, Sam Yick's place, and also Jung Kim's, was at Bakersfield, and the *countryman* referred to would therefore already be in the United States.

(g) The Sam Yick Company, Riverside, is not shown to be in any way connected with either of the defendants.

2. The next letter is United States Exhibit 12L, appearing in the Transcript on p. 177. This letter is addressed to *"Brother Jock Coy,"* and signed *"Jock Toh,"* stamped *"Deang Jock Toh,"* and dated April 7, 1911. The letter refers to smuggling. All of the remarks numbered a, b, c, d and e, made with reference to the previous letter, Exhibit 12J, are applicable to this one.

3. The next letter is U. S. Exhibit 12K, and is found in the transcript on page 179. This letter is addressed to *"Brother Jock Coy"* and signed *"Deang Jock Toh,"* dated April 14, 1911. This letter also refers to smuggling of Chinese. And remarks a, b, c, d and e, above noted, are applicable to it also.

4. The next letter is U. S. Exhibit 12I, and appears on pp. 182 and 183 of the transcript. It is addressed to *"Jock Coy Father"* and signed *"Jeung Foo On,"* dated June 4, 1911, and addressed on the envelope, *"Please deliver to 'Deang Jack Toy.'"* All of the remarks a, b, c, d and e, above made with reference to Exhibit J, are applicable to this letter. And it will further be noticed that the date is subsequent to the conversation of Morse, the government inspector, with the defendant Sam Yick, which occurred May 8, 1911. [Tr. p. 44.]

5. The next letter appears in the Transcript at p. 184 as U. S. Exhibit 12D. It is addressed to *"Friends Jock Gim and Jock Coy"* and signed *"Jeung Jenck Bing,"* and dated June 1st, 1911. Remarks a, b, c, d and e, above made, are applicable to this letter also.

6. U. S. Exhibit 12H, appearing in the Transcript at p. 185, is the next letter. This is addressed to *"Brother Jock Coy"* and signed *"Deang Jock Toh,"* and dated June 13, 1911. It refers to "paying somebody money for getting me over to your place" and to the fact that the writer should get started soon and would write home after he had *"crossed."* The same remarks a, b, c, d and e are applicable to this letter also.

7. The next letter appears in the Transcript at p. 187 as U. S. Exhibit 12M. It is addressed to *"Brother Jock Coy"* and signed *"Deang Jock Toh,"* from Ensenada, dated Sept. 2, 1911, and addressed on the envelope, "Deliver this to Sam Yick Company of Bakers-

field." Remarks a, b, c, d and e, above made, apply to this letter also.

8. The next letter is U. S. Exhibit 12A and appears in the Transcript at pp. 188 and 189. It is addressed to *"Brother Jock Coy"* and signed *"Deang Jock Toh,"* dated Sept. 3, 1911, addressed on the envelope, *"Important letter for Mr. Deang Jock Gim,* the address being "Sam Yick Kim Kee Co. Phone Main 113, P. O. Box 363, 723, 18th street, Bakersfield, Cal." The same remarks a, b, c, d and e apply equally to this letter, and it will further be noticed that on the envelope it expressly states it is for *"Deang Jock Kim,"* who is in no way connected with either of the defendants as far as the record shows.

9. The next letter is U. S. Exhibit 12G, and appears in the Transcript on p. 191. It is addressed to *"Jock Coy"* and signed *"Quong You,"* dated Sept. 2, 1911. Remarks a, b, c, d and e, above made, apply equally to this letter.

Nearly all these letters refer directly or indirectly to the bringing of Chinese into the country. They were all introduced in evidence by the government and read to the jury over the objections of each of the defendants. Their introduction was undoubtedly highly prejudicial to the defendants. Each of the defendants objected to the introduction of the letters and of each and every one of them. We submit that such evidence as this is clearly incompetent and inadmissible. The only connection of any kind shown by the record between these letters and either of the defendants is the fact that in October, 1911, they were found in a

tin box in a store occupied by the defendant Sam Yick. There is no evidence as to how the letters got there, or when. They are not shown to have been mailed at any particular place or time, or at all. The theory on which the government offered them in evidence was that they supported Sam Yick's alleged statement to Morse, the government inspector, made on May 8, 1911, that he had letters from certain people in Juarez, Mexico, who wanted to come over to the United States. Is the finding of the letters in question in the defendant's store four or five months thereafter, without any showing of how or when they got there, any corroboration of this statement. Not one of the letters is shown to be from Juarez. Nor is a single one of the letters addressed or signed by either of the defendants. On the envelope of some of them the name "Sam Yick Company" or "Sam Yick Kim Kee" appears. But what does this signify? To begin with, the record is silent as to any connection of defendant Sam Yick with either of these companies; and the defendant Jung Kim is, without a doubt, a total stranger to either of them, as far as the record shows. Assuming, however, that the defendant Sam Yick is one and the same with Sam Yick Company and Sam Yick Kim Kee Company, what significance is to be gathered from the fact that these names appear on some of the envelopes? The letters themselves are not addressed to either Sam Yick or Jung Kim. The government's own witness, Morse, testified that the Chinese of the vicinity kept their papers at Sam's store [Tr. p. 75]. The evidence further shows that Sam Yick ran an employment bureau

[Tr. pp. 194-5, 204] and furnished Chinese labor [Tr. pp. 199, 200]. His store was the headquarters for Chinese in that vicinity. No proof of ownership of these letters was made other than the finding of them in a box at defendant's store. No demand was made for their return [Tr. p. 158] until their sudden and unexpected appearance at the trial. Unquestionably the letters were left in the store by or for some of the numerous Chinese who made their headquarters there. Are they, then, proper and competent evidence against these defendants? They are clearly hearsay and utterly incompetent, and their introduction should not have been permitted.

Furthermore, even if we assume that the letters were addressed to the defendants, or either of them, yet there is no evidence at all to show that the defendants read them or that they acquiesced in any manner in their contents, or that they acted on any information contained in them or that by their acts or conduct they invited the sending of them. It is not contended that the defendants, or either of them, wrote the letters, and if it were there is no evidence to support the claim. Under this state of facts the following authorities support the view that these documents were hearsay, incompetent, and should not have been admitted in evidence, to-wit:

An unanswered letter *from a third person* to the defendant, found in the possession of the defendant when arrested, is hearsay and inadmissible evidence against the defendant, and the possession of it is not

evidence of acquiescence of the defendant in its contents, so as to make its contents evidence against him, where it is not shown that the defendant acted upon any information contained in the letter, or by his acts or conduct invited the sending of it to him.

People v. Colburn, 105 Cal. 648.

*Approved in*

Sorenson v. U. S., 168 Fed. 796.

Letters found upon a Chinese prisoner charged with murder, written from one Chinese society to another, giving warning of his probable arrest, and requesting direction to him that he might change his residence, are inadmissible, in the absence of proof tending to connect him with the sender, and to show that he acted on their contents.

People v. Lung, 129 Cal. 491.

An unanswered letter found in the pocket of a prisoner on his arrest is *not* competent evidence. Silence cannot, in such case, be considered an admission of matters referred to in the letter.

People v. Green, 1 Parker Cr. R. 11.

On a trial for murder, letters were produced which were found in possession of the prisoner, written to him by the deceased, and sister and daughter of the deceased, tending to show knowledge by the writers of improper relations between the prisoner and the daughter, but no evidence was introduced to show that the

letters were in response to any by the prisoner. *Held* that they were inadmissible, being *mere hearsay*.

Willett v. People, 27 Hun. (N. Y.) 469.

Where in a prosecution under Rev. St. U. S., section 5480, making it a penal offense to defraud by means of the postal service, the government seeks to show that the defendant fraudulently offered to provide places for unemployed teachers, *letters in reply* to those written to schools in reference to alleged vacancies are not admissible in evidence against a party who has not expressly referred another to him for information in regard to a disputed matter.

Bass v. U. S., 20 App. D. C. 232.

In a homicide case a letter to the county attorney written by a person with whom defendant was living, protesting her innocence, expressing a desire that defendant be punished, and promising to make disclosures, is incompetent.

State v. Rocker (Ia.), 106 N. W. 645.

In a prosecution for forging a certain deed, a postal card purporting to have been written by the recorder and addressed to a third person was hearsay and inadmissible for any purpose.

State v. Minton (Mo.), 22 S W. 808.

Letters written by the person injured or by third persons, addressed to the accused and received by him, but never answered or acted on by him, are inadmissible unless they are part of the *res gestae*.

12 Cyc. 434.

See also;
U. S. vs. Wong Quong Wong, 94 Fed. 832,
U. S. vs. Abrams, 230 Fed. 313.

> "Were such evidence admissible against a defendant charged with crime, there would be no limit to the power of designing persons to manufacture testimony against their neighbor."

We desire to call attention to the fact that each of the defendants severally objected to the introduction of these letters, and if it should be held that there is some evidence connecting them with defendant Sam Yick, the record is still absolutely bare of any evidence involving the defendant Jung Kim with them in any manner. The admission of these letters was assigned as error [Tr. p. 240].

**In Conclusion.**

It is quite apparent that no matter where the scheme originated, it required not only the intelligent direction and necessary co-operation but the insistent and never ceasing persuasion, amounting almost to compulsion, of the government officials to insure the taking of even a single effective step towards the consummation of the plan. The principles of sound public policy, then, have been violated by the detestable and insufferable actions of government officials in procuring these defendants to commit a crime. The constitutional rights of these defendants have been violated by the seizure of their private papers and the refusal to surrender them on demand. And in addition the subsequent introduction of these papers in evidence against the defendants was not only a further violation of

their constitutional rights but was also, for other reasons as above pointed out, an error highly prejudicial to them. For these reasons the judgment should be reversed.

Respectfully submitted,

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